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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO MONTES,

Defendant and Appellant.

B290304

(Los Angeles County
Super. Ct. No. BA456586)

APPEAL from the judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Armando Montes appeals the judgment entered after a jury convicted him of a lewd act upon a child under the age of 14, his then 11-year-old stepdaughter Eva. The jury also found true that Montes, who impregnated Eva, personally inflicted bodily harm and great bodily injury on Eva. On appeal Montes contends the trial court improperly excluded testimony from his medical expert at trial concerning the likelihood of a woman becoming pregnant after touching her vagina with semen deposited outside the vagina. Montes also asserts there was insufficient evidence to support the verdict. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Information

The information charged Montes with one count of committing a lewd act upon a child under the age of 14 in violation of Penal Code¹ section 288, subdivision (a). The information was amended at trial to allege the offense was committed between June 1, 2016 and August 31, 2016. The information specially alleged Montes personally inflicted bodily harm and great bodily injury on Eva within the meaning of section 667.61, subdivisions (a), (d)(6) and (7).

B. The Prosecution Case

1. Lay witness testimony

Eva's seventh grade science teacher in 2017 taught sexual education, which covered the male and female anatomy,

¹ All statutory references are to the Penal Code unless otherwise indicated.

reproductive systems, sexual diseases, and how a woman becomes pregnant. The teacher explained to the class how a sperm cell fertilizes the egg and what semen is, and she showed the class a photograph of a sperm cell. However, she did not describe what semen looked like.

Eva testified she was born in July 2004. In 2016 she lived at her grandmother's house with her stepfather, Montes; her mother, Jessica Mendez; her aunt; her three school-age younger sisters, who were nine, seven, and six years old; and her baby sister. At that time her school-age younger sisters attended elementary school with Eva.

On March 16, 2017, when Eva was 12 years old, she gave birth to a baby girl.² According to Eva, she had never had sexual relations before she gave birth. Eva first learned she was pregnant when she went to the hospital for stomach pain on March 15. Montes and Mendez took her to the hospital, but Mendez left briefly to retrieve her telephone charger. Only Montes was in the room with Eva when the doctors told her she was pregnant. Mendez returned to the hospital about 10 minutes later.

When the hospital staff first asked Eva how she got pregnant, she told them she did not know. The first person Eva told how she got pregnant was her mother. Eva explained she got pregnant after Mendez and Montes returned from a "date night" and had fallen asleep in the bedroom. Eva went into the bedroom to look for something with which she would normally sleep, like a teddy bear. Eva believed Montes and Mendez had just had sexual intercourse, but she was not sure. Once in the room, Eva found clothes on the

² Eva would have been 11 years old when she became pregnant, given testimony she was 37 weeks pregnant at the time she gave birth.

floor and, because she did not like messes, she picked up the clothes and put them on a chair. At that point she noticed “[w]hite stuff on [her] hand” that was “sticky and dirty.” She was not sure which part of her hand had the white substance on it. She also did not know what it was.

After Eva left the bedroom, she went to either the bathroom or her bedroom to touch her vagina. At trial Eva did not recall what part of her vagina she touched or for how long. She did not recall why she touched her vagina with the white substance or whether she did anything to wash the substance off. When asked at trial why she touched herself, she responded, “I don’t know.” Eva recounted that after she learned she was pregnant, she discussed with her mother what masturbation was, and based on that conversation Eva testified she may have touched herself in a manner that was masturbation.

On the same day, after Eva spoke with her mother, Los Angeles Police Officers Robert Calzadillas and Abel Munoz interviewed Eva at the hospital. Although Montes was alone in the room with Eva, Officer Calzadillas had him step out of the room for the interview. Eva initially stated she did not know how she became pregnant because she never had sexual intercourse. After the officers continued to ask Eva questions, she recounted the date night incident and suggested that may have been how she became pregnant. In describing the incident, she stated that after picking up Montes’s clothing, she went to the bathroom, and “she felt a sudden itch to scratch her vagina area so she scratched herself; and then after that, she noticed she had a white clear liquid on her hand.”

When asked at trial why she had not told the police officers or anyone else prior to the preliminary hearing that she was

masturbating, Eva explained she did not know what masturbation was until her mother told her. Eva also testified that although she knew sexual intercourse could result in pregnancy, she did not know pregnancy was caused by semen. She could not explain given her lack of understanding that the sticky substance on her hand was semen, or that semen was responsible for pregnancy, why she told the police officers during their interview at the hospital about touching herself with semen.

Eva testified about her home situation. Typically her aunt or Montes would pick her up from school sometime between 4:00 and 4:30 p.m. There were always two adults at her home. Because Mendez often worked at night and Eva's grandmother came home late, typically Eva and her siblings were in the house with Montes and Eva's aunt. On the weekends Eva was home with only Montes and her siblings.

After Montes was arrested, Eva felt terrible because she looked up to him and "he was the only dad [she] knew because [her] biological dad wasn't there." Eva described Montes as "the best dad ever." Mendez was very sad when Montes was arrested. Eva felt responsible for Montes's arrest, and stated, "[I]t was my mistake, a mistake I made."

On cross-examination, Eva testified she had never been sexually assaulted. Although Mendez described masturbation to Eva, Mendez never told her that she needed to use that word. Eva was not afraid of Montes; he had been a caring father figure, and he did not teach her to lie or tell her what to tell the police.

2. *Expert testimony*

Dr. Earl Fuller, an obstetrician/gynecologist, testified as the prosecution's expert on fertility. His practice included work in

fertility treatment. The prosecutor inquired of Dr. Fuller about a hypothetical mirroring the facts of the case, in which “a 12-year-old girl touches clothes and after she touches the clothes, she has semen on her hands Then she goes back to bed and at some point touches her vagina either to itch it or to masturbate.” When asked his opinion about the feasibility of the girl becoming pregnant, Dr. Fuller responded it would be “[s]o slight [as] to be virtually impossible.”

Dr. Fuller based his opinion on the following factors: the semen on the clothes was exposed to outside air; semen dries very quickly on clothes; and “the sperm will die within minutes to maybe an hour [and in] some places it will go as far as two hours.” He explained, “If [the semen has] been on the clothing for two hours, it’s probably all dead by now. If it’s been on there for a half an hour, a good portion of them are dead. And if she gets them on her hands, she’s picking the semen out that’s close to the air which is the dead stuff.” He added that if the young girl gets it on her hand and scratches her vagina, “she’s scratching with just the end of her finger. She’s not sticking a lot of semen in her so that’s not going to give her much semen to become pregnant with.” Rather, she would transfer only a small amount of sperm to her vagina, which amount is not consistent with becoming pregnant. In addition, young children when they touch themselves for stimulation “generally touch the clitoral area which is quite a bit removed from the opening of the vagina. [A]nd it’s unlikely to . . . introduce enough sperm into the vagina to become pregnant.”

Dr. Fuller explained it takes approximately one million sperm to dissolve the protective capsule surrounding the egg to enable a single sperm to penetrate the egg’s capsule and cause a pregnancy. In addition, the sperm needs to travel to the end of the woman’s

fallopian tube, which is caused by the deposit of the sperm in the back wall of the vagina by an erect penis, which, as a result of contractions of the uterus, streams into the mucous of the cervix, where the sperm find the opening to the fallopian tube. Many of the sperm get “lost” on their way to the fallopian tube, so there needs to be “a highly significant number of sperm.” A man’s ejaculate contains on average 250 million sperm, but only 10 percent travel to the uterus, and of this amount, many do not get through the tiny opening to the fallopian tube.

In addition, if a woman is scratching the vagina or masturbating, any sperm on the fingers would be deposited near the opening of the vagina, and it would have to travel approximately 11 inches to the opening of the cervix. As a result, because the vagina is in an “acid atmosphere,” in which the acid kills the sperm, most of the sperm would be lost to the acid as the sperm travel to the cervix. Also, because sperm are “foreign encroachment[s],” the woman’s body will produce white blood cells to further attack the sperm. Although a woman can become pregnant where a male ejaculates outside of the vagina, this occurs only if there are at least 250 million sperm put inside or next to the vagina.

On cross-examination, Dr. Fuller admitted it was not scientifically confirmed that sperm could live only up to two hours on a piece of clothing. Further, if the temperature in the room was warmer, the semen would “[t]heoretically” have more time to survive. When asked whether it was “impossible” or “highly unlikely” that a female who touches the sperm, then scratches or masturbates, would become pregnant, Dr. Fuller responded, “It’s so highly unlikely it’s virtually impossible, but you never say ‘never’ in

medicine. [¶] . . . [¶] . . . It's not impossible, but it's right next to it."

Christina Nash, a forensic DNA analyst, analyzed the DNA that had been collected from Montes, Eva, and Eva's baby.³ Nash opined based on her testing there was a 99.99 percent probability Montes was the father of Eva's child.

C. *The Defense Case*

Montes testified on his own behalf. He was "shocked" to learn Eva was pregnant. When his attorney inquired why Montes did not at that time ask Eva how she got pregnant, Montes responded he did not know "who to ask or what to say," and he "wanted her to have enough trust in [him] to just tell [him] and not to force her to give [him] an answer." Also, once the baby was born, Montes was not allowed near Eva.

Montes denied ever sexually touching Eva. Even after the police officers told him during their interrogation at the police station that Eva had confessed to having sex with him, Montes continued to deny having sexual intercourse with her. Montes also denied ever being alone with Eva or with Eva and Eva's baby sister. When asked about having sexual intercourse with Mendez, Montes testified he "did not finish inside of her, because . . . she didn't want to get pregnant." Instead, he ejaculated on her stomach, and the ejaculate was cleaned up "[w]ith clothes or whatever was at hand."

Vasonne McDonald, a social worker for the Los Angeles County Department of Children and Family Services, interviewed Eva on March 15, 2017. Eva told McDonald about the "date night"

³ Los Angeles Police Detective Jose Olmedo took swabs from Montes, Eva, and Eva's baby that were used for the DNA analysis.

on which she picked up the clothing in the bedroom and there was “white stuff” on the clothing. Eva told McDonald she wiped the white substance on her vagina because she was curious. Eva denied she was sexually abused. McDonald also met with Eva’s younger sisters and did not observe any signs of prior sexual or physical abuse.

Officer Munoz testified, contrary to Officer Calzadillas’s testimony, that when the officers responded to the hospital on March 15, Eva was in the hospital room, and Montes was in the hallway. On cross-examination, Officer Munoz stated Montes was “[c]alm and quiet” and answered the officers’ questions; he did not appear to be in shock.

D. The Prosecution’s Rebuttal Witnesses

Victor Vargas was an employee of an after-school program that Eva and her three sisters attended. He reviewed the records of September 8, 9, 14, 15, and 27, 2016, which showed Eva’s three younger sisters were picked up on those dates at approximately 6:00 p.m., when the program ended.

Clarissa Cota was the property manager at the building where Montes, Mendez, Eva, Eva’s sisters, and Eva’s aunt and grandmother lived in 2016. Cota maintained detailed logs by date and time of people who entered and left the apartment, based on surveillance footage from the building. Cota described the records from September 8, 9, 14, 15, and 27, 2016. The records showed Montes on some of the dates entering alone with a girl and a baby, although Cota did not know the name of the girl. The records also showed that on September 8 the other family members were not in

the apartment during a portion of the time in which Montes was there with the girl and the baby.⁴

Natalie Cortez, a social worker for the Los Angeles County Department of Children and Family Services, interviewed Montes in April 2017. Montes told her that when he had sexual intercourse with Mendez, he would ejaculate inside her vagina; he denied he had ever ejaculated outside of her on clothing, rags, or anything similar.

E. *The Defense Surrebuttal*

Mendez testified that when she first asked Eva at the hospital how she became pregnant, Eva responded she did not know. However, after “a dozen people saw [Eva],” Eva told Mendez she had touched her vagina after getting the white substance on her hand. Eva did not use the term “masturbation,” but Mendez described masturbation to her after Eva stated she touched herself. Mendez did research and discovered it was “possible” to get pregnant through masturbation; it was not “highly likely, but [it was] not impossible.”

According to Mendez, Montes was never alone with Eva. In 2016 Eva and her three school-age sisters were in the same K-8 school, and all four left the after-school program at the same time. Therefore, there were always other siblings in the apartment when

⁴ The People argue the surveillance logs showed Montes lied about never being alone with Eva because the logs reflected he was alone with her on all five dates. However, the logs only established Montes was alone with Eva and the baby on September 8, 2016 from 4:36 to 4:49 p.m. On the other dates Montes was alone with Eva before entering the apartment, but another adult was present inside the apartment.

Eva was there. In addition, Mendez, the grandmother, or the aunt were always home in the afternoon when the children came home.

When Mendez was asked whether Montes would ejaculate inside her, she responded, “Sometimes inside, sometimes outside.” She was not in a “stable birth control” stage, but she was not purposefully avoiding becoming pregnant. When Montes ejaculated outside her vagina, Mendez used a shirt or something else to clean off the ejaculate.

F. *The Verdict and Sentence*

Following closing arguments and jury instructions, the jury found Montes guilty of committing a lewd act upon a child under the age of 14, and found true the allegation Montes personally inflicted bodily harm and great bodily injury on Eva within the meaning of section 667.61, subdivisions (a), (d)(6) and (7).⁵ The trial court sentenced Montes to 25 years to life in prison. Montes timely appealed.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Excluding the Testimony of Dr. Steven Gabaeff*

Montes contends the trial court erred in excluding the testimony of Dr. Steven Gabaeff about the likelihood of a woman

⁵ Section 667.61, subdivision (a), provides for a sentence of 25 years to life if the defendant personally inflicted great bodily injury on the victim (§ 667.61, subd. (d)(6)) or personally inflicted bodily harm on a victim who was under 14 years of age (§ 667.61, subd. (d)(7)). The jury found the allegations under both section 667.61, subdivision (d)(6) and (7), to be true.

becoming pregnant by touching her vagina with semen, which would have supported Montes's defense that this was how Eva became pregnant. The trial court did not abuse its discretion.

1. *The hearing on the prosecution's motion to exclude the testimony of Dr. Gabaeff*

Prior to the presentation of the parties' opening statements, the People moved to exclude Dr. Gabaeff's testimony on the ground he was not qualified to render an expert opinion on the likelihood of Eva becoming impregnated by touching herself with Montes's semen. Dr. Gabaeff later testified outside the presence of the jury pursuant to Evidence Code section 402.

Dr. Gabaeff practiced emergency medicine during the prior 40 years and clinical forensic medicine during 30 of those years. During that time, he delivered approximately 20 babies and talked with hundreds or thousands of women who were concerned about their pregnancies. Dr. Gabaeff was also the past director of a sexual assault response team, which responded to cases of unintentional pregnancies. In this role he was involved in approximately 1,500 cases involving alleged sexual assault.

Over the prior 30 years Dr. Gabaeff had testified as an expert in emergency medicine, forensic medicine, and sexual abuse, but he was not on the obstetrics/gynecology panel of experts because he was "an emergency room doctor who occasionally delivered babies." Dr. Gabaeff confirmed he did not have an internship or residency in obstetrics and gynecology and was not board certified in obstetrics and gynecology. Neither had he ever published an article addressing how a woman becomes pregnant.

With respect to how sperm cause a woman to become pregnant, Dr. Gabaeff first learned about the fertilization process

during his biology class in the eighth grade, but he “amplified that knowledge” during medical school and as the director of the sexual assault response team. When asked how he amplified his knowledge, Dr. Gabaeff testified “[t]here really hasn’t been much change[] . . . since what [he] learned in [eighth] grade,” but he enhanced his knowledge through talking with pregnant women, reading about pregnant women, and learning of the events and circumstances that caused the women to become pregnant as part of his clinical forensic work.

When questioned about the bases of his opinion about the amount of sperm in a milliliter of semen, Dr. Gabaeff testified he relied on five articles to validate the numbers he believed were the “likely average for a healthy male who is capable of fertilizing his wife or partner with children.” Dr. Gabaeff described Web M.D. as a Web site with medical information for lay people to use, as well as a “professional version.” But he added, “It’s more oriented towards consumers now than it was before” Dr. Gabaeff also consulted a Mayo Clinic article entitled *Low Sperm Count* as one of his reference materials for the amount of sperm in semen. He obtained the article from a public Web site and noted that “[a]nybody can Google that article.”

Montes’s attorney argued Dr. Gabaeff was not “giving any opinion that requires any special knowledge beyond . . . how pregnancy can occur.” When Montes’s attorney reminded the trial court that Dr. Gabaeff delivered 20 babies, the trial court noted this experience “doesn’t have anything to do with how they got there.” Montes’s attorney argued Dr. Gabaeff was qualified to testify about how much sperm is in a certain amount of ejaculate and how the

sperm travel through the vagina to the fallopian tube.⁶ The trial court rejected this argument and sustained the People's objection that Dr. Gabaeff lacked sufficient qualifications to testify as an expert on the likelihood of Eva becoming impregnated by touching her vagina with Montes's semen.⁷

2. *Applicable law*

Evidence Code section 720, subdivision (a), provides that a witness is qualified to testify as an expert if he or she "has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his [or her] testimony relates." "[T]he qualifications of an expert must be related to the particular subject upon which he is giving expert testimony. Qualifications on related subject matter are insufficient." (*People v. Hogan* (1982) 31 Cal.3d 815, 852 (*Hogan*) [criminalist was not qualified to testify as to whether blood on defendant's clothing and shoes had been splattered or transferred by contact, where he had read a book about blood patterns and observed bloodstains at crime scenes, but had never performed a

⁶ Montes points out that had Dr. Gabaeff testified, he would have provided an opinion consistent with his report, in which he stated that he "can with virtual 100% certainty (i.e. > 95% certainty) [state] that the events as described by the defendant's step daughter, hereafter (Eva), are plausible, highly probable and virtually certain to be what happened."

⁷ On appeal Montes points to Dr. Gabaeff's report to support an argument Eva's hymen "was intact." Dr. Gabaeff stated in his report that Eva "had been seen by a family [doctor] and no evidence of hymen damage was noted." However, the report was not admitted into evidence, and it does not appear from the appellate record that Eva's medical records were admitted at trial.

laboratory analysis of blood patterns], disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836; accord, *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1115 (*Howard Entertainment*); see *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 66-67 [“The fact that the purported expert may be qualified in one field vaguely related to another does not mean that he is qualified in that other field.”].)

“Whether a person qualifies as an expert in a particular case . . . depends upon the facts of the case and the witness’s qualifications.’ . . . ‘[T]he determinative issue in each case is whether the witness has sufficient skill or experience in the field so his testimony would be likely to assist the jury in the search for truth.’” (*Howard Entertainment, supra*, 208 Cal.App.4th at p. 1115, citation omitted; accord, *Brown v. Colm* (1974) 11 Cal.3d 639, 645 (*Brown*); *ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 293.)

“Except to the extent the trial court bases its ruling on a conclusion of law (which we review de novo), we review its ruling excluding or admitting expert testimony for abuse of discretion.” (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 (*Sargon*); accord, *People v. Jones* (2012) 54 Cal.4th 1, 57 [“The trial court’s determination that a witness qualifies as an expert is a matter of discretion that will not be disturbed absent a showing of manifest abuse.”]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1175 [“The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court . . . [,] [which] is necessarily broad” (Citations omitted.)].) “A ruling that constitutes an abuse of discretion . . . [is] one that is ‘so irrational or arbitrary that no reasonable person

could agree with it.” (*Sargon*, at p. 773; accord, *Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th 1155, 1162.)

Montes relies on the language in *Sargon* that trial courts must be cautious in excluding expert testimony, “especially when, as here, its exercise implicates a party’s ability to present its case.” (*Sargon*, *supra*, 55 Cal.4th at p. 773; accord, *ABM Industries Overtime Cases*, *supra*, 19 Cal.App.5th at pp. 293, 295-296 [trial court abused its discretion in excluding plaintiff’s expert on database management and analysis where expert had extensive experience in database management and analysis, but had no formal education or membership in professional organizations on the subject matter]; *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 472 [“exclusion of the sole expert relied upon by a party because of an erroneous view of his or her qualifications in a case where expert testimony is essential is an abuse of discretion”].) However, even where the trial court excludes the only expert called by a party, we must review whether the decision was “irrational or arbitrary.” (*Sargon*, at p. 776 [trial court did not abuse its discretion in excluding plaintiff’s sole expert on lost profits where his calculations were based on speculative methodology].)

Montes also relies on the holding in *Brown*, in which the trial court excluded the testimony of a surgeon who had medical training and experience regarding the standard of care in repairing a vaginal fistula with stainless steel sutures during the period of his medical practice, but based his opinion on the standard of care in effect 10 years before he started practicing on an “exhaustive” study of the available medical literature. (*Id.* at p. 642.) The Supreme Court concluded the trial court erred in excluding the testimony because the doctor had relevant professional experience on the

subject, and he properly relied on the medical literature to opine on whether the practice was the same 10 years earlier, observing that the “case does not involve circumstances in which a physician has had no practical experience upon which to base his testimony and relies entirely upon textual material for his opinion” (*Id.* at pp. 643-644.) The court reasoned that the doctor had the “professional experience which gives him a knowledge of the trustworthy authorities and the proper sources of information, as well as a degree of personal observation of the general subject enabling him to estimate the plausibility of the views expressed.” (*Id.* at p. 644, citing 2 Wigmore on Evidence (1940) § 665b, pp. 784-785.) Further, it was unlikely the plaintiff would have been able to find an expert with the specialized experience relevant to a surgery performed 23 years before trial. (*Brown*, at p. 644.)

3. *The trial court did not abuse its discretion in excluding the testimony of Dr. Gabaeff*

Montes contends the trial court abused its discretion because Dr. Gabaeff was a qualified doctor with sufficient background about human anatomy, how much sperm is contained in the ejaculate, how much sperm is needed to fertilize an egg, and how the sperm travels through the vagina to the fallopian tube to fertilize the egg. Montes’s contention lacks merit. Although Dr. Gabaeff had experience as an emergency room doctor in the delivery of babies, he lacked any relevant experience in fertility, specifically, the likelihood that sperm deposited outside the vagina would fertilize an egg, causing a female to become pregnant. Although Dr. Gabaeff obtained information from the Internet on the quantity of sperm in a man’s ejaculate, he had no background, training, or experience related to fertilization of an egg or what the probability was of

sperm being ejaculated outside of the vagina, surviving in the open air, being transferred to the outside of the vagina, travelling from the vagina to the cervix, finding the small entrance to the fallopian tube, travelling to the end of the fallopian tube, then reaching the egg in a quantity that is sufficient to fertilize an egg.

This case differs from *Brown* in that Dr. Gabaeff “had no practical experience upon which to base his testimony and relie[d] entirely upon textual material for his opinion.” (*Brown, supra*, 11 Cal.3d at p. 643.) Montes failed to show Dr. Gabaeff had “special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.” (Evid. Code, § 720, subd. (a); accord, *Howard Entertainment, supra*, 208 Cal.App.4th at p. 1115.) Similar to the criminologist in *Hogan* who had never performed an analysis of blood splatter, Dr. Gabaeff’s experience as an emergency room doctor practicing clinical forensics was not “related to the particular subject upon which he [was] giving expert testimony.” (*Hogan, supra*, 31 Cal.3d at p. 852.)

Accordingly, the trial court’s finding Dr. Gabaeff was not qualified to testify about the likelihood Montes’s sperm could fertilize an egg to impregnate Eva was not “so irrational or arbitrary that no reasonable person could agree with it,” and the trial court did not abuse its discretion in excluding the testimony. (*Sargon, supra*, 55 Cal.4th at p. 773; accord, *Property California SCJLW One Corp. v. Leamy, supra*, 25 Cal.App.5th at p. 1162.)

B. *Substantial Evidence Supports the Verdict*

Montes contends there was not sufficient evidence to support the verdict in light of the evidence he was a caring father; he was willing to cooperate with the police; there was no evidence of any

sexual or physical abuse of Eva’s younger sisters; Eva consistently denied having sex with Montes; and Dr. Fuller conceded it was “possible” Eva could have become pregnant from touching herself with Montes’s sperm. Contrary to Montes’s contention, substantial evidence supports the verdict.

1. *Standard of review*

In evaluating the sufficiency of the evidence to support a conviction, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.” (*People v. Penunuri* (2018) 5 Cal.5th 126, 142 (*Penunuri*); accord, *People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

““We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” [Citation.] A reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’ the jury’s verdict.” (*Penunuri, supra*, 5 Cal.5th at p. 142, quoting *People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Lindberg* (2008) 45 Cal.4th 1, 27 [“A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.”].)

2. *The record as a whole supports the jury's verdict*

The DNA test showed Montes was the father of Eva's baby, and Dr. Fuller testified it was "virtually impossible" for Eva to have become pregnant through masturbation or scratching her vagina. Although Montes, Mendez, and Eva all denied Montes was ever alone with Eva, surveillance records of the apartment showed Montes was alone with a female child and a baby on at least one occasion, on September 8, 2016. Mendez testified Eva and her three school-age siblings left the after-school program at the same time, but the program's records showed only three of the children left the program at 6:00 p.m. Further, Eva testified she typically left the program with Montes or her aunt between 4:00 and 4:30 p.m. Although Montes points out social worker McDonald interviewed Eva's younger siblings, and there were no signs of prior sexual or physical abuse, this was consistent with the fact Eva came home with Montes before her younger siblings.

Although Montes and Eva denied having sexual intercourse, both provided inconsistent and changing statements regarding relevant details. Eva first told the hospital staff she did not know how she became pregnant. Then she told her mother she became pregnant after touching herself (in what later was described as masturbation) with a white substance from clothing in the bedroom. When Eva talked to Officers Calzadillas and Munoz at the hospital, she initially stated she did not know how she became pregnant. Then she recounted the date night incident, but stated "she felt a sudden itch to scratch her vagina," and only after scratching herself did she notice the white substance on her hand. Eva also testified she did not know that semen causes a woman to become pregnant, even though she learned about sperm and semen from her seventh grade teacher. Further, Eva could not explain given her lack of

knowledge about how semen caused pregnancy why she told her mother and the police officers that she became pregnant by touching herself with the white sticky substance from clothing in the bedroom. Montes said he was “shocked” when he learned Eva was pregnant, but Officer Munoz testified Montes did not appear to be in shock when he and Officer Calzadillas interviewed him shortly after he found out Eva was pregnant; rather, Montes was “calm and quiet” and answered the officers’ questions.

Although Eva testified the first person she told about the date night incident was her mother, Mendez testified Eva told her at the hospital she did not know how she became pregnant. It was only after “a dozen people saw [Eva]” that Eva told Mendez she had touched her vagina after getting the white substance on her hand. Further, a reasonable juror could have found Eva’s description of what happened was not credible, given her description of walking into the bedroom while Montes and Mendez were asleep, tidying up the bedroom, picking up clothing with Montes’s semen, and deciding for an unexplained reason to touch her vagina although she described the white substance as “sticky” and “dirty.”

Finally, Montes and Mendez provided inconsistent statements about whether he ejaculated inside or outside Mendez’s vagina. Montes testified he “did not finish inside of her, because . . . she didn’t want to get pregnant,” so he ejaculated on her stomach. However, in April 2017 Montes told social worker Cortez he had never ejaculated outside Mendez’s vagina. Mendez testified Montes sometimes ejaculated outside her vagina, but stated she was not purposefully avoiding becoming pregnant. Mendez denied that Montes “always ejaculates” inside her vagina.

On appeal, we do not reweigh witness credibility. (*Penunuri, supra*, 5 Cal.5th at p. 142; *People v. Lindberg, supra*, 45 Cal.4th at

p. 27.) Given the evidence Montes was the father of Eva’s baby; Montes lied about never being alone with Eva; Dr. Fuller’s testimony it was “virtually impossible” for Eva to have become pregnant through masturbation or scratching her vagina; and the inconsistent testimony of Montes, Mendez, and Eva as to how Eva became pregnant, there was substantial evidence to support the verdict, viewing the evidence “in the light most favorable to the prosecution and presum[ing] in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.” (*Penunuri*, at p. 142; accord, *Lindberg*, at p. 27.)

DISPOSITION

The judgment is affirmed.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

STONE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.